UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. S1-1:06 CR 134 CDP DDN
	)	
DENNIS DINWIDDIE,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon the pretrial motions of defendant Dennis Dinwiddie which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on September 14, 2007. [1]

MOTIONS TO SUPPRESS EVIDENCE

Defendant Dennis Dinwiddie has moved to suppress statements (Doc. 223), to suppress evidence (Docs. 224 and 245), and to suppress identification (Docs. 231 and 259). From the evidence adduced at the hearing, the undersigned makes the following findings of fact and conclusions of law:

FACTS

Controlled Delivery of the Marijuana

1. In January 2006, Clarksville, Tennessee, Police Detective Tim Anderson became involved in a marijuana investigation, when Det. Anderson received a phone call from an officer in Texas. The Texas officer had intercepted a couple of Federal Express packages after a drug trained dog had alerted to the packages. The Texas officer obtained a search warrant and found that the packages contained between

[1]At the conclusion of the hearing counsel for defendant asked for an opportunity to file written memoranda after a transcript of the proceedings was prepared. The transcript was filed on October 1, 2007. The final post-hearing memorandum was filed on December 13, 2007. (Doc. 328.)

fifty and fifty-five pounds of marijuana. The Texas officer forwarded the packages to Det. Anderson because they were addressed to a location in Clarksville, Tennessee.

2. Det. Anderson received the marijuana packages and on January 27, 2006, undercover agent Scott Hendrickson conducted a controlled delivery of the packages to the destination address, 376 South Lancaster, Apartment 266 in Clarksville, Tennessee. The controlled delivery involved the issuance and execution of a search warrant for the same location. Barbara Dinwiddie, later identified as the sister of Dennis Dinwiddie, signed for and accepted the packages when they were delivered, but signed her name as Debbie Bryant. Det. Anderson was in the parking lot of the apartment complex at the time of the delivery, approximately 150 yards away. From the parking lot, he could see the front door of Apartment 266. Other officers were located throughout the complex. Officer Frederick McClintock was closer than 150 yards from the apartment, while other officers were farther away.

3. After the packages were accepted, the officers did not immediately execute the search warrant. First, they established surveillance on the residence to determine whether anyone else was involved with the packages. Within minutes of the undercover agent's delivery, Det. Anderson observed Dennis Dinwiddie enter Apartment 266. Dennis Dinwiddie left the apartment shortly after he arrived. When he left, he was seen to be carrying a white piece of paper, believed to be one of the shipping receipts for the Federal Express packages. An officer broadcast over the radio a description of Dinwiddie carrying the receipt.

4. After Dennis Dinwiddie left the apartment, the officers remained in their positions and waited. During that time, Barbara Dinwiddie also left the apartment. When she returned, she was accompanied by her brother, Christopher, and her mother, Carolyn. The officers continued to wait. About two hours after delivering the packages, the officers executed the search warrant. Three or four officers, including Det. Anderson, executed the search warrant. Anderson knocked on the door, and when Barbara Dinwiddie opened the door, he identified himself, stated he had a search warrant for the

residence, and stepped inside the apartment with the other officers. The officers did not have their guns drawn.

5. When the officers entered the apartment, Barbara Dinwiddie and her mother and brother were in the apartment. The officers explained they had a narcotics search warrant and gave Barbara a copy of the warrant. No one was handcuffed during the entry. The officers searched Barbara, Christopher, and Carolyn Dinwiddie. The officers spoke with Barbara Dinwiddie and told her they were searching the apartment in connection with the packages. She responded that she did not know anything about the packages. The officers then asked Carolyn Dinwiddie if she knew anything about the packages. She said she did not. The officers did not threaten Carolyn or tell her to ask her daughter to cooperate with the investigation. Dennis Dinwiddie was not present when the officers spoke with his mother and his sister.

6. The three Dinwiddies were originally seated in the kitchen. After the officers finished searching the living room, they told the Dinwiddies they could move to the living room and sit on the couch. Soon after the officers' entry, the officers concluded the family was not involved and told them they were free to leave. Christopher and Carolyn indicated they wanted to stay with Barbara. The officers did not arrest Barbara Dinwiddie because the investigation was ongoing and an arrest could jeopardize the investigation going forward.

7. The officers found and seized the two packages Agent Hendrickson had delivered. The boxes were just inside the front door of the residence, sitting on the floor.

8. While Det. Anderson was in Apartment 266, Dennis Dinwiddie returned to the parking lot of the apartment complex. At the time, Det. Anderson was still in the Dinwiddie apartment and did not personally observe Dennis return. Three officers were still in the parking lot, and other officers were in vehicles, waiting to see if anyone returned to the complex. Det. Anderson had asked the officers to be in a position where they could observe if Dennis Dinwiddie returned to the apartment complex, and asked the officers to approach Dinwiddie if and when he returned. Anderson indicated to the officers that he wanted the encounter to be consensual if possible.

9. Sergeant James Bert Clinard of the Clarksville Police Department met Dennis Dinwiddie on the sidewalk outside of Building 26 at the Orchard Park Apartments. When Dinwiddie first drove up to the apartment complex, three officers approached him. Officers notified Sgt. Clinard, who was inside the apartment, by radio that Dinwiddie was pulling up to the apartment complex, and he left the apartment immediately. When Sgt. Clinard arrived, Dinwiddie was standing behind the car, talking with Agent Macias.

10. During the encounter in the parking lot, Dennis Dinwiddie was not restrained or handcuffed. He was not formally arrested or told he was under arrest. Sgt. Clinard informed Dinwiddie of his investigation and either Sgt. Clinard or Agent Macias asked Dinwiddie if they could search his person and his vehicle.

11. Because of the nature of the investigation, the officers wanted to be sure Dinwiddie did not have a weapon in his possession. And, because the officers saw him come out of the apartment with the white piece of paper, they wanted to learn his involvement in the transaction. Sgt. Clinard asked Dinwiddie if he had any weapons or drugs on his person and if he objected to being searched. Dinwiddie did not appear to be under the influence of any controlled substances or alcohol. In response to the request for a search, Dinwiddie said "Go ahead," thereby consenting to the search of his person and his vehicle.

12. The officers searched Dinwiddie and found and seized from his back pocket a shipping label that had come off one of the delivered packages of marijuana. Sgt. Clinard did not arrest Dinwiddie at the end of this encounter.

13. With Dinwiddie present, the officers searched his car. He did not object to the search or attempt to limit the scope of the search. During the search of the vehicle the officers found a shoebox in the trunk; the box contained almost $10,000 in cash. Dinwiddie explained that the cash came from a deposit on the wheel shop he co-

owned. The officers did not seize the cash or any other evidence from the vehicle.[2]

14. The officers did not use any threats, force, or coercion against Dinwiddie that day. They did not make any promises or misrepresentations to him to get him to consent to the searches of him or his vehicle. At the time of the request to search, Dinwiddie was not handcuffed or restrained in any way. He was in a public area and none of the officers had their guns drawn. While Dinwiddie would have been stopped if he tried to leave, the officers never told him that he was not free to leave. Dinwiddie was very cooperative during the encounter.

15. One of the officers who had been outside the apartment stepped into the apartment and informed Det. Anderson that Dennis Dinwiddie had returned to the apartment complex and that he had the package receipt with him. Anderson left the apartment to confirm that the officers had recovered the package receipt. Dennis was then brought into the apartment, where he was taken to the bedroom. Dennis walked past his family members who were seated in the living room, on his way to the bedroom. The officers brought Dennis to a separate room to afford him some privacy and to facilitate his cooperation.

16. Det. Anderson, Agent Hendrickson, and Sgt. Clinard were in the room waiting for Dennis Dinwiddie. Agent Hendrickson walked back into the living room almost immediately after Sgt. Clinard and Det. Anderson began to question Dinwiddie.

17. Dennis Dinwiddie was not handcuffed at the time. Det. Anderson from memory recited to Dinwiddie his Miranda rights, even though he was not under arrest. He advised Dinwiddie that he had the right to remain silent, that anything he said may be used against him in a court of law, and that he had a right to talk to an attorney before questioning if he wished. He added that, if Dinwiddie could not afford to hire an attorney, one would be appointed to represent him. Det. Anderson also advised Dinwiddie that, if he decided to answer questions without a lawyer present, he still had the right to stop answering questions at any time and to talk with an attorney.

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[2]Though the officers did not seize the money, the government expects someone to testify at trial about the cash found in the trunk.

18. Dennis Dinwiddie indicated he understood those rights and agreed to talk with Det. Anderson. He did not appear to be intoxicated or suffering from any mental defect or deficiency. Dinwiddie is a well spoken and intelligent individual, capable of understanding his rights and the consequences of waiving them. None of the officers made any threats, promises, or displays of physical force or coercion. More specifically, none of the officers threatened Dinwiddie. Dinwiddie's brother and mother remained in the apartment with Barbara Dinwiddie during the interview. At the time, Dennis Dinwiddie was 28 years old and had attended one year of college. Dinwiddie had been previously arrested and convicted on several occasions.

19. Before asking any questions, Det. Anderson told Dinwiddie that his sister, Barbara, had fifty pounds of marijuana sitting in her living room and that was the reason for the officers' presence. In response, Dennis Dinwiddie asked, "if I cooperate, will that help my sister?" Det. Anderson responded that he could not make any promises or guarantees, but would explain the nature of any cooperation to the prosecutor's office, and the prosecutor's office would determine what consideration should be given to his cooperation.

20. After waiving his rights, Dinwiddie did not deny knowledge of the packages. He said that a man he knew as Sergio (later identified as Sergio Burgos) had sent the packages to him. According to Dinwiddie, Sergio would be returning to Clarksville to take custody of the packages. At that point, Det. Anderson asked Dinwiddie to contact Sergio. The officers hoped to identify Sergio and arrest him in Clarksville on an actual possession charge.

21. Dinwiddie said he could contact Sergio and try to sort things out and see when he was coming back to Clarksville. The officers explained that, if Dinwiddie agreed to cooperate, they would want to rent a motel room and place the marijuana in the motel room where they could keep custody of it until Sergio came to Clarksville to get the drugs.

22. Dinwiddie agreed to call Sergio and did so from the bedroom of Barbara Dinwiddie's apartment. Dinwiddie placed the call by direct connection, using a walkie-talkie type phone that had been in his

possession. As a result, Det. Anderson was able to hear both ends of the conversation. Sergio had been informed that police were in the apartment complex, and during their phone conversation, Dennis Dinwiddie indicated the police were talking to someone else within the complex.

23. During the course of their conversation, Sergio confirmed that the packages contained marijuana. Dinwiddie asked how much was in the packages, to which Sergio responded fifty and a half. Dinwiddie asked, "is it all green?" and Sergio responded "yes."

24. Sergio asked Dinwiddie to get him an airline ticket from McAllen, Texas, to Nashville, pick him up in Nashville, and then drive him back to Clarksville, Tennessee. Dinwiddie agreed to cooperate with the officers' investigation, and to contact them about Sergio's flight details.

25. At the end of the interview with police, Dinwiddie remained in the apartment with his family. He was not placed under arrest and he was not taken back to the police station. The police did not seize Dinwiddie's phone because he needed it to continue his cooperation. The conversation with Dinwiddie took a total of fifteen to twenty minutes. Thereafter, the officers left the premises.

26. Later that day, Det. Anderson telephoned Dennis Dinwiddie to find out the status of Sergio's airline ticket. The officers were expecting Dinwiddie to go online and purchase Sergio's ticket. Det. Anderson called Dinwiddie again the next day to inquire about the status of Sergio's airline ticket.

Meeting Between Meador and Dinwiddie

27. Sometime in February or March 2006, Michael Meador and his half-brother, Billy Meador, met Dennis Dinwiddie (whom they knew only as "Dee") at C & M Wheels, a wheel shop co-owned by Dinwiddie. This was Billy's first contact with Dinwiddie. When they met, Dinwiddie gave Michael Meador $10,000, and told Michael to go with Sergio and another Mexican male to Texas to obtain some marijuana. Michael and Billy Meador were to transport the marijuana back to Dinwiddie. When they got to Texas, Michael Meador gave the $10,000 to Sergio.

28. Michael and Billy Meador waited for three nights. By the fourth day, still not having heard from Sergio, they called Dinwiddie and told him Sergio had taken their money and not called them back. Dinwiddie told Michael and Billy to take a Greyhound bus to Memphis, he would pick them up in Memphis and bring them back to his wheel shop.

29. Dinwiddie met Billy and Michael Meador in Memphis, and then drove back to the wheel shop in Clarksville, some 200 miles away. During the drive back to the wheel shop, Michael Meador and Dinwiddie talked about getting back at Sergio for good. Michael Meador explained that he and Sergio had been roommates when they worked together for Robinson Construction, and that connection would allow him to get Sergio's address.

Shooting at the Meador Residence

30. On the morning of April 22, 2006, Michael Hunt was at the house of Eve Meador, Michael Meador's grandmother. Michael Meador had told Hunt to wait outside and flag down Dennis Dinwiddie and Lawan James and show them where to park. Meador told Hunt who Dinwiddie was, referring to him as "Dee." Shortly thereafter, Hunt first encountered Dinwiddie when he drove up to the Meador home in a white car with Lawan James. Hunt knew Michael Meador, but had not previously seen either Dinwiddie or James. Meador had told him that Dinwiddie and James were from Clarksville, Tennessee.

31. Meador and Hunt met Dinwiddie and James outside the residence. Later, Meador, Dinwiddie, and James entered the house, while Hunt stayed outside and waited -- as he was told to do. Later, Hunt was invited into the house. The house was about 500 square feet in size. When Hunt went into the house, he saw Dinwiddie pull out a large handgun and heard him say, "we're going to do him right here."

32. Raoul Cruz and Sergio Burgos, two Hispanic males, also arrived at the Meador house that morning. Cruz had not met Dinwiddie before. He later described him as a tall, thin African-American male, who wore glasses, and whom he knew as Dennis. Burgos had told Cruz they were going to Meador's home to pick up the money from distributing marijuana.

33. When Cruz and Burgos arrived at the house, Hunt and Meador ran into the bathroom, fearing that one of the Hispanics was going to be killed. While they were in the bathroom, they heard shots fired. From there, Hunt and Meador escaped the Meador home through the bathroom window and retreated to an adjoining trailer house. Neither Hunt nor Meador observed the shooting. During the incident, Dinwiddie shot Raoul Cruz in the leg.

34. After hearing the gunshots, Hunt saw Cruz limping and dragging Burgos's body out of the house. James then came out of the house. Dinwiddie left the house and walked over to the trailer house, where Hunt and Meador were now located. Michael Meador walked out to meet him in the front yard of the trailer. Hunt was in front of the trailer, between ten and twenty yards from Meador and Dinwiddie. Hunt observed the conversation between Meador and Dinwiddie through the trailer window. The two spoke for about a minute or two. It was daylight at the time and Hunt could see Meador and Dinwiddie clearly.

35. After their conversation, Meador walked around the block to get the car. Dinwiddie came through the back of the trailer and approached Hunt, who was standing in the doorway at the back of the trailer. As Dinwiddie approached Hunt, he handed Hunt a gold chain and a gold cross. Hunt took the items and told Dinwiddie he had just gotten out of prison and "I don't want no part of this." Hunt told Dinwiddie he didn't need to worry about him. Dinwiddie told Hunt to keep his mouth shut: "Don't tell nobody what happened."

36. Dinwiddie then asked Hunt if he had any identification. After Hunt pulled out his ID, Dinwiddie noted some of the information. The conversation between Hunt and Dinwiddie lasted about three or four minutes. The two were face to face. After this encounter, Hunt did not see Dinwiddie again.

37. Hunt later described Dinwiddie to Sgt. Heath as a tall, dark-skinned, skinny, African-American male, with glasses, who went by the name of "Dee." Hunt described James as a shorter, heavier set, African-American male, with long braided hair, who went by the name "G-Loc."

Hunt could not remember if Dinwiddie wore earrings or jewelry or had any tattoos.

38. Once the car, that Cruz and Burgos had used, was pulled around, James put Sergio Burgos's body in the trunk. Cruz had to arrange the body so the trunk would close. Cruz drove the car, while James held him at gun point. Cruz thought James and Dinwiddie were going to kill him. At Dinwiddie's direction, they dumped Burgos's body by a roadside curve. Dinwiddie was then driving another car but met Cruz and James at the dump site.

39. At the dump site, Dinwiddie told Cruz to keep his mouth shut or he would come to Texas and kill him and his family. Dinwiddie took Cruz's wallet out, took his money, pictures, his birth certificate, and his Social Security card. After Dinwiddie wrote down Cruz's information, he returned the pictures, but kept his birth certificate and Social Security card. James gave Cruz some money so Cruz could go back to Texas. After noting his information, Dinwiddie told Cruz to "tell [his] people not to fuck with Daryl." Cruz believed the reference to "Daryl" was an effort by Dinwiddie to confuse Cruz into thinking his name was Daryl and not Dennis. After that conversation, Cruz had no further contact with James or Dinwiddie, and returned to Texas.

Interview of Billy Meador

40. On April 23, 2006, Sgt. William Cooper of the Missouri State Highway Patrol interviewed Billy Meador. Cooper met with Billy Meador at the Portageville, Missouri, Police Department. Sgt. Scott Stoelting had asked Sgt. Cooper to interview Meador. Two other officers had previously interviewed Billy, but they were out of town on that day. This was Cooper's first contact with Meador.

41. At the time of the interview, and afterwards, Billy Meador was not a suspect in the homicide; he was then considered only a witness. Billy Meador was not Mirandized by either Sgt. Cooper or the officers initially conducting the interview. Billy Meador was not placed under arrest at any time.

42. Billy Meador went to the police station voluntarily. From there they traveled to several locations in a pickup truck which Sgt.

Cooper drove. Billy Meador was seated in the passenger's seat to the right of the driver, and Sgt. Rawson was seated behind Sgt. Cooper. During the drive, Sgt. Cooper questioned Billy Meador. They went first to Herb Joiner's home to retrieve an SKS semi-automatic weapon. The SKS was not believed to be the murder weapon, but was relevant to the overall investigation and needed to be seized. In his statements to the police, Billy Meador only referred to Dennis Dinwiddie as "Dee," never as "Dennis Dinwiddie," and at the time of the interview, Sgt. Cooper did not know that Dee was Dennis Dinwiddie. The interview ended after midnight and Sgt. Cooper drove Billy Meador home. Billy Meador gave the officer his cell phone number and told him he would be available. Sgt. Cooper asked Billy Meador if he would be able to identify Dee from a photo lineup, and Billy Meador responded that he would.

43. During the interview, there was nothing unusual about Billy Meador's demeanor or behavior. He did not appear to be under the influence of any drugs, alcohol, or medication. He was cooperative and helpful.

Interview of Michael Hunt

44. On April 26, 2006, Missouri State Highway Patrol Sgt. Jeffrey Heath interviewed Michael Hunt in the Burgos murder investigation. The interview began around 11:40 p.m. in the Dyersburg Police Department, in Dyersburg, Tennessee. At the time, Hunt went to the police department voluntarily. He was not under arrest and was not handcuffed at any time during the interview. At the time of the interview, Sgt. Heath viewed Hunt as a witness, and not as a suspect. Sgt. Stoelting also participated in the interview.

45. Even though he was not under arrest, Hunt was advised of his Miranda rights, and signed a waiver of rights form. Sgt. Heath showed Hunt the waiver of rights form and had Hunt read along, as the officer read the form to him. The waiver form stated,

> Having read this statement of my rights and understanding them, I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or force of any kind has been used against me.

(Gov. Ex. D-1.)

46. Sgt. Heath did not coerce, physically force, or make any promises so Hunt would sign the waiver form. Hunt signed the form at 1:56 p.m. and made a statement to the officer. (Id.) After the interview, which ended around 2:00 or 3:00 a.m. the next morning, Sgt. Heath did not place Hunt under arrest. Some of the interview was videotaped.

Creation of the Photographic Lineup

47. A photographic lineup was compiled on April 27, 2006, by a civilian employee of the Missouri Highway Patrol in Jefferson City, Missouri. The photographic lineup consisted of one sheet of paper with two rows of three color photographs. Each of the photographs was set against a blue background and featured a head-to-shoulders picture. The second photograph on the first row was a picture of Dennis Dinwiddie. The six photographs depicted African-American men, all appearing to be about the same age. Three of the men, including Dennis Dinwiddie, wore glasses. All six men had short hair, a moustache, and a goatee. One of the men, not Dennis Dinwiddie, had a lighter complexion than the others. (Gov. Exs. D-2, D-4, D-10.)

Michael Hunt's Identification of Dinwiddie

48. On April 27, 2006, Sgt. Heath met with Michael Hunt in an office in the Portageville Police Department. Hunt went to the police station voluntarily that day, at the request of Sgt. Heath, who had asked him if he would come to the station to look at a photographic lineup. When Hunt agreed, Sgt. Heath sent a police car to pick him up. He was not placed under arrest, and Sgt. Heath did not make any promises or threats, or use any force to get Hunt to cooperate. Hunt was not Mirandized.

49. Before showing Hunt the photo lineup, Gov. Ex. D-2, Sgt. Heath stated that a suspect from the April 22 incident might, or might not, be in the lineup. Heath did not mention any specific name. When he saw the lineup, Hunt became visibly upset and immediately pointed to the picture of Dennis Dinwiddie. Hunt said he knew the subject as

"Dee." Hunt then wrote his name, the date, and the time next to the photo he selected. Hunt also wrote, "#2 is the man I know as Dee. Dee is one of the two black men who killed Sergio" at the bottom of the photographic lineup. Hunt signed the photographic card at 1:41 p.m. (Gov. Ex. D-2.) He was not arrested after this identification.

50. At the time of the interview, Hunt was alert and did not appear to be under the influence of any drugs. He appeared visibly afraid throughout the interview, shaking and expressing a fear that Dinwiddie was going to kill him. Dinwiddie had not yet been arrested when Hunt was shown the photographic lineup.

51. At the end of the interview, Hunt said he could be reached by contacting his mother. The Portageville police then took him back to his mother's residence.

Billy Meador's Identification of Dinwiddie

52. On April 27, 2006, Billy Meador met with Sgt. Cooper in an office at the Portageville Police Department. Meador went to the police department voluntarily and was not under arrest at the time. In the office, Sgt. Cooper showed Billy Meador a photographic lineup. Before showing Billy Meador the lineup, Sgt. Cooper told him the man he knew as "Dee" might, or might not, be in the photographic lineup. Once he was given the lineup sheet, Billy Meador immediately pointed to the photograph of Dennis Dinwiddie and said, "that's him, number two right there." Billy Meador then wrote his name above the photograph of Dinwiddie and wrote at the bottom of the array, "the guy above is known to me as Dee." Sgt. Cooper also signed, dated, and timed the photographic lineup. Billy Meador made the identification at 2:44 p.m. (Gov. Ex. D-10.)

53. During the interview, there was nothing unusual about Billy Meador's demeanor or behavior. He did not appear to be under the influence of any drugs, alcohol, or medication. He was cooperative and helpful.

Issuance of Search Warrants

54. On April 27, 2006, Circuit Judge Charles L. Spitler of the Circuit Court of New Madrid County, Missouri, issued an arrest warrant for the arrest of Dennis Dinwiddie charging him with the murder of Sergio Burgos-Gonzalez and with armed criminal action. (Gov. Ex. D-8.) On April 27, 2006, the Missouri Highway Patrol telephoned Det. Anderson and told him that Sergio Burgos's body had been found in a ditch, that he had been shot, and that an arrest warrant had been issued for Dennis Dinwiddie for the killing. The Missouri Highway Patrol officers indicated they would be coming to Clarksville and asked Anderson for assistance in locating Dinwiddie and help in recovering any possible evidence in the case.

55. The Missouri Highway Patrol officers arrived in Clarksville on April 27, 2006, and that night Det. Anderson and the Patrol officers applied for and received three search warrants from the General Sessions Court of Montgomery County, Tennessee. One was to search 416 Manorstone Lane in Clarksville, Tennessee (Dennis Dinwiddie's residence) (Gov. Ex. D-5); the second was to search C & M Wheels at 2901 Fort Campbell Boulevard (Dinwiddie's business) (Gov. Ex. D-6); and the third was to search 376 South Lancaster Drive, Apartment 266 (Barbara Dinwiddie's apartment)[3] (Gov. Ex. D-7.) Each of the search warrants also authorized a search of Dennis Dinwiddie's person.

56. Agent Kelly Darland submitted similar, written, sworn affidavits, Government Exhibits D-5, D-6, D-7, in support of the applications for the search warrants. Each affidavit describes how agents of the Clarksville Police Department conducted the controlled delivery of marijuana to Barbara Dinwiddie's apartment. While the officers were at the apartment complex, officers stopped Dennis Dinwiddie and performed a consensual search of his person and car. In the trunk of his car, officers discovered over $10,000 in cash.

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[3]At the evidentiary hearing the court was advised that the government also obtained a search warrant to search Dennis Dinwiddie's Chevrolet vehicle. The officers did not seize any evidence from the vehicle and the government does not have any evidence to present at trial as a result of that search. (Doc. 252 at 9.)

Dinwiddie said the money was related to his business, C & M Wheels, on Fort Campbell Blvd. The affidavit also repeats investigated details of the murder of Sergio Burgos by Dennis Dinwiddie at Meador's grandmother's home on April 22, 2006. A significant portion of the affidavit is based on the statements of Michael Hunt. According to the affidavit, Michael Hunt was connected with the death of Burgos. Hunt referred to Dennis Dinwiddie as "D" in the facts of the affidavit. The affidavit states, "'D' was later identified as Dennis Dinwiddie, who is part owner of a tire and wheel shop in Clarksville, Tennessee." Finally, in the affidavits, Agent Darland states, among other observations,

> "[d]rug dealers very often will hide contraband, proceeds of drugs sales and records of drug transactions in secure location[s] such as their own residences, locations which they control but which are titled in the names of others, residences of others who are participants in or aiders and abettors of the drug conspiracy . . . [and] their businesses . . . ."

(Gov. Exs. D-5, D-6, D-7.)

57. Each of these warrants stated the finding that there was probable cause to believe that evidence of first degree murder, armed criminal action, and evidence of violations of the Money Laundering Act of 1996 and the Tennessee Drug Control Act of 1989 would be found within the listed location. In particular, each of the warrants listed the specific evidence to be searched for at the location, including, among other items, "a .45 caliber handgun, a .32 caliber handgun . . . blood, bloody clothing, DNA evidence and fiber evidence, any or all equipment, devices, records, computers and computer storage discs, to include the seizure of computers to retrieve such records . . . all financial records pertaining to the disposition of the proceeds of the violation of the criminal laws specified above . . . [and] programmable instruments such as telephones, voice mail, answering machines, [and] electronic address books . . . ." (Gov. Exs. D-5, D-6, D-7.)

58. The warrant documents were presented to Judge Jack Hestle at his residence around 9:00 p.m. on April 27, 2006. Judge Hestle reviewed the affidavits and signed the warrants. The affidavits contained a typographical error, reading March, when they should have read April.

The error was noted to Judge Hestle and he handwrote "April" in place of "March." The warrants were issued at 9:10 p.m. on April 27, 2006. Beyond the typographical error, there was nothing out of the ordinary about the warrants. Det. Anderson believed he had probable cause to believe that the described evidence would be found on the indicated premises as set forth in the affidavits presented to Judge Hestle.

59. The top of each warrant indicated the type of evidence the officers would search for. The structure of the warrant was based on an archetype used by the Nashville police department. The structure of the warrant was approved by the Clarksville District Attorney's office and the judges of the county. The Clarksville Police Department has been using the current structure and format for close to ten years. Despite the standard format, the language for the evidence to be searched for and seized changes depending on the charges and the evidence sought. For large scale drug organizations, a lot of the standard language is not altered, given the similarity in the operations of the large scale organizations.

60. The first category of evidence included guns and ammunition. Specifically, investigators were looking for a .45 caliber handgun and a .32 caliber handgun. The information on the handguns was received from the Missouri investigators. Another category of evidence referred to fiber-type evidence. Fiber-type evidence refers to DNA evidence and trace evidence that would be associated with a violent crime scene. The next category of evidence referred to equipment, computers, records, and the like. This evidence relates to items used in obtaining, delivering, packaging, and dispensing controlled substances -- essentially paraphernalia associated with a large scale drug operation.

61. Another category of evidence concerned indicia of ownership of the premises. In this case, the officers were looking for any documentation that would show a nexus between the person being investigated or the subject of the investigation, and the actual residence. Another aspect of indicia of ownership would be information that ties specific people to specific items of evidence in the residence. The investigators were also looking for certain financial records. This would include proceeds of illegal drug activities,

evidence of commingling of funds into a possible business account or into personal accounts, or any other proceeds in violation of the Money Laundering Act or the Tennessee Drug Control Act, which would be subject to seizure or forfeiture. Finally, Det. Anderson indicated the officers would be looking for any evidence that might be used to conceal any of the evidence listed in the search warrant.

62. The warrants were executed on April 27, 2006, and April 28, 2006, and the officers seized items from each location. From Dinwiddie's residence, 416 Manorstone Lane, the officers seized a receipt from the Flying J Travel Plaza in Matthews, Missouri, dated April 22, 2006; a computer tower with the serial number 105861756; and clothing, i.e., two pairs of Timberland boots, one brown t-shirt, one gray t-shirt, and one pair of blue jeans. (Gov. Ex. D-5.) From C & M Wheels, 2901 Fort Campbell Blvd., the officers seized two pieces of paperwork. (Gov. Ex. D-6.) From Barbara Dinwiddie's apartment, 376 South Lancaster, Apartment 266, the officers seized a pair of Nike tennis shoes. (Gov. Ex. D-7.)

Dennis Dinwiddie's Arrest and Interview

63. The Clarksville Police Department arrested Dennis Dinwiddie during the late hours of April 27, 2006, or the early morning hours of April 28, 2006. Dinwiddie was arrested pursuant to the arrest warrant issued by Judge Charles Spitler of the Circuit Court of New Madrid County, Missouri, on April 27, 2006. When Dinwiddie was arrested, the Clarksville police seized a cellular phone and a wallet that was on his person.

64. After his arrest, the officers took Dinwiddie to the major crimes unit building in Clarksville, where Sgt. Stoelting interviewed him. Sgt. Stoelting informed Dinwiddie of his Miranda rights and presented him with the Missouri State Highway Patrol's notification and waiver of rights form. (Gov. Ex. D-9.) Dinwiddie signed the form on April 28, 2006, at 1:37 a.m. Dinwiddie told the police he was 28 years old and had completed high school and one year of college. He told the sergeant he worked for C & M Wheels in Clarksville. He signed the waiver of rights form, in Sgt. Stoelting's presence, at 1:38 a.m., in

two places, thereby expressly stating that he understood his rights and that he waived them. (Id.)

65. Before Dinwiddie's arrest, Sgt. Stoelting was aware that Dinwiddie had a criminal history involving robbery, kidnaping, counterfeiting, and a drug violation.

66. After Dinwiddie signed the waiver of rights form, he had a brief conversation with Sgt. Stoelting, and then ended the interview by requesting to speak with an attorney. Sgt. Stoelting ended the interview as soon as Dinwiddie requested an attorney. The interview lasted less than ten minutes. When the interview ended, Sgt. Stoelting left the room and told one of the Clarksville officers to take Dinwiddie to jail.

67. Sgt. Stoelting was told that officers had taken a cellular phone and wallet from Dinwiddie at the time of his arrest. Stoelting was also aware of the search warrants that had been issued in connection with Dinwiddie. The cell phone was not listed among the items seized in the search warrants.

68. Stoelting received the cell phone from the Clarksville Police Department. Stoelting was concerned about securing the information on it. In his experience, cell phones will only store a limited number of incoming and outgoing phone numbers. If those numbers are not captured, there is the risk that they will be deleted. Another concern involves the battery dying or the phone being turned off. Depending on the type of phone and the phone company, a voice or text message will be stored only for a limited period of time. There is an automatic delete function for some of the information in a cell phone's memory. Stoelting was not aware of the particular functions and capabilities of Dinwiddie's specific phone.

69. To preserve the evidence on the cell phone from being lost, Stoelting accessed the information in the cell phone memory, including lists of received calls and dialed calls, and the phone's address book. In accessing the information in the phone, Stoelting noticed that phone calls had come in between the time of Dinwiddie's arrest and the conclusion of the interview. These phone calls replaced and deleted two

other phone calls stored in the phone. The Clarksville officers did not apply for a search warrant to search the cell phone.

70. When officers took Dinwiddie into custody, Lawan James had not yet been arrested. Officers were still looking for him.

Interview of Raoul Cruz

71. On May 5, 2006, Sgts. Heath and Stoelting met with Raoul Cruz at the Bellville County, Texas, Sheriff's Department. Cruz had been arrested on a Missouri murder warrant. The officers advised Cruz of his Miranda rights and Cruz signed both a notification and waiver of rights form in their presence. (Gov. Ex. D-3.) The waiver of rights form states that no promises or threats, or any pressure or force, were made against Cruz. Sgt. Heath asked Cruz if he understood English, and Cruz responded that he did. At 11:11 a.m. Cruz signed the form in two places, expressly stating thereby that he understood his rights and that he waived them. (Id.) Thereafter he was interviewed by Sgt. Heath.

72. Sgt. Heath did not make any promises or threats to Cruz. During the course of the interview, Cruz was allowed to leave and go to the bathroom and was given something to drink. In the interview, Cruz initially indicated he had not been in Missouri since 1997. After denying any knowledge about the events in Missouri, Sgt. Heath convinced Cruz that he and Sgt. Stoelting knew he had been in Missouri and had information concerning the death of Sergio Burgos, mentioning some of the evidence they had. Within five or ten minutes, Cruz no longer denied knowledge of the events surrounding Burgos's death. When Cruz acknowledged being in Missouri, he became upset and angry, jumped up, pulled his jail pants down, and showed the officers the bullet hole in his leg. Cruz indicated he and Sergio Burgos had gone to a house in Missouri on April 22, 2006.

73. At the time of the interview, Cruz had been in custody for a couple of days. He appeared alert during the interview. At the end of the interview, Sgt. Heath told Cruz he wanted him to look at some photo spreads. Heath asked Cruz if he would be able to identify the man he knew as Dennis and Cruz said he could do so.

Raoul Cruz's Identification of Dinwiddie

74. On May 11, 2006, Sgt. Heath met with Raoul Cruz at the New Madrid County Sheriff's Department. Cruz was not handcuffed, threatened, coerced, or given any promises. Sgt. Heath showed Cruz a photographic lineup and told him that one of the men from the April 22 incident, might, or might not, be in the lineup. When Sgt. Heath showed Cruz the lineup, Cruz immediately identified picture number two as the African-American male he knew as Dennis. Cruz did not appear upset by the photograph of Dinwiddie; he simply said, "that's Dennis right there." Cruz then initialed and dated the photograph. He also wrote at the bottom of the photographic lineup: "No. #2 Man I know as Dennis who shot me and Sergio," and signed the statement. (Gov. Ex. D-4.) Sgt. Heath showed Cruz a second photographic lineup, in the hope he could identify Lawan James. He could not.

DISCUSSION

A. Motion to Suppress Statements

Dinwiddie argues his statements to the government agents on January 27, 2006, should be suppressed. He also argues that any other statements to be used against him should be suppressed. In particular, Dinwiddie argues the statements were involuntary, were taken in violation of Miranda, and were the direct result of an illegal detention. (Doc. 223.)

Question of Voluntariness

Dinwiddie first attacks the voluntariness of the statements he made to the officers. He argues his cooperation was induced by the officers' threats to arrest him and his family members.

A statement is constitutionally involuntary when it is induced by the interrogating officers through threats, violence, or express or implied promises sufficient to overcome the defendant's will and critically impair his capacity to decide whether or not to cooperate. United States v. LeBrun, 363 F.3d 715, 724 (8th Cir. 2004) (en banc). Whether a confession is involuntary is judged by the totality of the

circumstances, but with a focus on the conduct of the officers and the characteristics of the accused. Id.

In this case, there is no evidence the agents engaged in coercion, deception, or intimidation -- either in the parking lot or Barbara Dinwiddie's apartment. During the encounter in the parking lot, Sgt. Clinard informed Dinwiddie of his investigation and explained that Dinwiddie was not under arrest. The officers in the parking lot did not employ any strong-arm tactics or use any threats, force, or coercion against Dinwiddie. The officers did not make any promises or misrepresentations to Dinwiddie and never handcuffed or otherwise restrained him. The officers in the parking lot did not make any threats against Dinwiddie's family members. While in the parking lot, Dinwiddie was in a public area and the officers did not have their weapons drawn. Under the circumstances, the government has shown all of Dinwiddie's statements made in the parking lot were voluntary. See id.

The same is true of Dinwiddie's statements in the apartment. During the encounter in the apartment, the officers explained their presence in Barbara Dinwiddie's apartment. While in the apartment, the officers never threatened to arrest or harm either Dinwiddie or his family members. There is no evidence the agents overbore Dinwiddie's free will or impaired his ability to decide not to cooperate. In fact, the officers advised Dinwiddie of his right to remain silent and his right to speak with an attorney before answering questions. At the time of the interview in his sister's apartment, Dinwiddie was not under arrest, was not handcuffed, and did not appear to be intoxicated or suffering from any mental deficiencies. The facts indicate Dinwiddie appeared to be a well spoken and intelligent individual, capable of understanding his rights and the consequences of waiving them. Dinwiddie was 28 years old at the time, had attended college for one year, and had experience with criminal investigations. See United States v. Larry, 126 F.3d 1077, 1079 (8th Cir. 1997) (where defendant was 31 years old, had a high school equivalency diploma, and an extensive criminal history, facts indicated defendant's statements were

voluntary). The government has shown Dinwiddie's statements in the apartment were voluntary.

Miranda Issues

Dinwiddie next argues his statements to the officers were in violation of Miranda.

The Fifth Amendment to the Constitution protects an individual from being "compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. To safeguard an individual's Fifth Amendment rights, a suspect in custody must be warned, before being interrogated, that he has the right to remain silent and that any statement he makes may be used against him. Miranda v. Arizona, 384 U.S. 436, 444 (1966). In Miranda, the Supreme Court concluded that the inherently coercive nature of custodial interrogations blurred the line between voluntary and involuntary statements, heightening the risk that an individual would be deprived of the Fifth Amendment's protections. Dickerson v. United States, 530 U.S. 428, 435 (2000). The procedural safeguards prescribed by Miranda apply to persons who are subjected to interrogation and who are in custody. Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977) (per curiam). The simple fact that an investigation has focused on a particular suspect does not implicate Miranda if the settings are noncustodial. Minnesota v. Murphy, 465 U.S. 420, 431 (1984).

An individual is in custody if he has been formally arrested or if his freedom of movement has been restricted to a degree associated with a formal arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983). In determining the question of custody, the court first looks to the circumstances surrounding the interrogation. Thompson v. Keohane, 516 U.S. 99, 112 (1995). Given those circumstances, the court then asks whether a reasonable person would have felt at liberty to terminate the interrogation and leave. Id. The critical inquiry centers on whether the person's freedom to depart was restricted in any way. Mathiason, 429 U.S. at 495; LeBrun, 363 F.3d at 720. In making this inquiry, the court looks to the totality of the circumstances from an objective viewpoint, and not the subjective views of either the suspect or the

officers. Stansbury v. California, 511 U.S. 318, 322-23 (1994); LeBrun, 363 F.3d at 720.

The Eighth Circuit has developed a series of factors to help determine when an individual is in custody. United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990). These factors include: (1) whether the officer informed the suspect that the questioning was voluntary and the suspect was free to leave; (2) whether the suspect's freedom of movement was restrained during the questioning; (3) whether the suspect initiated contact with the authorities, or simply agreed to answer questions; (4) whether the officers employed strong-arm tactics or deceptive tactics during the questioning; (5) whether the atmosphere of the questioning was police-dominated; and (6) whether the officers placed the suspect under arrest at the end of the questioning. Id. These six factors are intended to be representative, rather than exclusive. United States v. Axsom, 289 F.3d 496, 501 (8th Cir. 2002). There is no requirement "that the Griffin analysis be followed ritualistically in every Miranda case." United States v. Czichray, 378 F.3d 822, 827 (8th Cir. 2004). Whether the six factors are consulted or not, the "ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest." Id. at 828.

Dinwiddie was not in custody while he was in the parking lot. The environment in the parking lot was one of a consensual nature and there was no objective indication Dinwiddie was not free to leave during the encounter. In addition, Dinwiddie's freedom of movement was not restrained. The officers approached Dinwiddie in a public area and did not have their guns drawn. As noted above, the officers did not employ any strong arm tactics or use any threats, force, or coercion against Dinwiddie. The officers did not make any promises or misrepresentations to Dinwiddie. The atmosphere in the parking lot was cooperative and consensual; it was not police dominated. There was very little questioning by the officers and at the end of the encounter the officers did not place Dinwiddie under arrest. On the other hand, the officers did not inform Dinwiddie that the questioning was voluntary and Dinwiddie did not initiate contact with the officers. Still, looking to the totality of the circumstances, the undersigned concludes that

Dinwiddie was not in custody. See Griffin, 922 F.2d at 1349. Since Dinwiddie was not in custody in the parking lot, the officers were not required to advise him of his Miranda rights. Mathiason, 429 U.S. at 494-95. Therefore, any statements made in the parking lot were not in violation of Miranda.

Unlike in the parking lot, Det. Anderson expressly advised Dinwiddie of his Miranda rights when he was in the apartment. Though he did not read from a card, Det. Anderson told Dinwiddie he had the right to remain silent, that anything he said could be used against him in a court of law, and that he had a right to speak with an attorney before questioning if he wished. The detective added that if Dinwiddie could not afford to hire an attorney, one would be appointed to represent him. Det. Anderson also advised Dinwiddie that if he decided to answer questions without a lawyer present, he still had the right to stop answering questions at any time, and to talk with an attorney. Dinwiddie indicated he understood these rights and agreed to talk with the officers in the apartment. As noted above, Dinwiddie's statements were voluntary and not the result of government coercion, deception, or intimidation. Under the circumstances, Det. Anderson properly advised Dinwiddie of his Miranda rights before questioning, satisfying the dictates of the Fifth Amendment.[4] See Miranda, 384 U.S. at 444.

Fruit of the Poisonous Tree

Finally, Dinwiddie argues his statements were the result of an illegal detention, and are therefore subject to suppression as fruit of the poisonous tree.

The Fourth Amendment to the Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. Under the Fourth Amendment, statements resulting from an unlawful detention or seizure may not be used in evidence. See Wong Sun v. United States, 371 U.S. 471, 488 (1963); United States v. Vega-Rico, 417

[4]Because Dinwiddie received proper Miranda warnings, the underlying issue of whether he was even in custody in the apartment need not be addressed.

F.3d 976, 979 (8th Cir. 2005), cert. denied, 547 U.S. 1073 (2006). "Verbal statements obtained as a result of a Fourth Amendment violation are as much subject to the exclusionary rule as are items of physical evidence discovered during an illegal search." Vega-Rico, 471 F.3d at 979. Issuing Miranda warnings before a statement does not necessarily insulate a Fourth Amendment violation. Brown v. Illinois, 422 U.S. 590, 603 (1975). The Miranda warnings, alone and per se, "cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." Id.

There are three categories of police encounters for Fourth Amendment purposes. United States v. Flores-Sandoval, 474 F.3d 1142, 1144-45 (8th Cir. 2007). The first category involves consensual communications with no coercion or restraint. Id. The second category involves Terry stops, minimally intrusive seizures which implicate the Fourth Amendment and must be supported by reasonable suspicion. Id. The third category involves full-scale arrests, which must be supported by probable cause. Id.

A consensual encounter does not implicate the Fourth Amendment. Id. at 1145. Law enforcement officers do not violate the Fourth Amendment simply by approaching an individual in public and asking questions of someone willing to listen. Id. Police questioning, without more, does not constitute a seizure. Id. For Fourth Amendment purposes, a consensual encounter becomes a seizure when, considering the totality of the circumstances, the questioning is so intimidating, threatening, or coercive that a reasonable person would have believed he was not free to leave. Id.; I.N.S. v. Delgado, 466 U.S. 210, 215 (1984).

The line between a consensual encounter and a seizure is imprecise, and each factual scenario must be evaluated on a case-by-case basis. United States v. Johnson, 326 F.3d 1018, 1021-22 (8th Cir. 2003). Nonetheless, certain factors will indicate a seizure has occurred. See id. The presence of several officers, a display of an officer's weapon, physical touching of the individual, the retention of an individual's personal property, the indication the individual is the focus of a particular investigation, the positioning of officers in a way that

limits the individual's freedom of movement, and the use of language or a tone of voice indicating that compliance with an officer's request might be compelled, are all factors indicating the individual has been seized. Flores-Sandoval, 474 F.3d at 1145; Johnson, 326 F.3d at 1021-22.

The encounter in the parking lot was a consensual encounter. Three officers approached Dinwiddie when he first drove up to the apartment complex. See United States v. Foster, 376 F.3d 577, 581-84 (6th Cir. 2004) (finding no seizure where three uniformed officers approached the suspect as he was emerging from a parked car with the engine running and asked him his name, what he was doing, and whether he had identification). The officers did not display their weapons, make physical contact or restrain Dinwiddie, or tell him he had to cooperate. See United States v. Favela, 247 F.3d 838, 840 (8th Cir. 2001) (finding no seizure where the two officers did not touch or restrain the suspect, tell her she had to cooperate, or speak to her in a coercive manner). The officers explained the nature of their investigation, but there is no indication the officers told Dinwiddie he was the focus of the investigation. There is also no indication the officers positioned themselves in a manner to restrict Dinwiddie's freedom or used coercive language in speaking with Dinwiddie. The officers approached Dinwiddie in a public place and asked for his consent to search him. See United States v. Hernandez, 854 F.2d 295, 297 (8th Cir. 1988) (no seizure where two officers approached suspect on the street, told him he was free to leave, and asked permission to speak with him and search his bag). Even though the officers would not have allowed Dinwiddie to leave, Dinwiddie was never told he was not free to leave. Looking to the totality of the circumstances, the encounter in the parking lot remained a consensual encounter, not subject to the Fourth Amendment. See Flores-Sandoval, 474 F.3d at 1144-45. Since the encounter in the parking lot was not subject to the Fourth Amendment, any statements made to the officers are not subject to suppression. See Wong-Sun, 371 U.S. at 488; see also United States v. Hessman, 369 F.3d 1016, 1023-24 (8th Cir. 2004) (where statements came after legal search, "there was no 'poisonous tree' from which any poisonous fruit could fall.")

Within the apartment, the encounter with Dinwiddie was no longer entirely consensual. Within the apartment, three officers walked Dinwiddie past his family members and into a separate room. See Johnson, 326 F.3d at 1022 (finding seizure where three uniformed officers approached the individual, separated him from another individual, stood closely at his side, and took possession of his driver's license). Dinwiddie was no longer in a public place, the officers did not tell him he was free to leave, and he was asked specific questions about the packages. Under the circumstances, a reasonable person would not have felt free to leave the apartment. See Delgado, 466 U.S. at 215.

That said, the officers did not illegally detain Dinwiddie. Officers executing a search warrant for contraband have the authority to detain the occupants of the premises while a proper search is conducted. Muehler v. Mena, 544 U.S. 93, 98 (2005). "An officer's authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Id.

In this case, the officers were in the apartment pursuant to a valid search warrant. As a result, they had the legal authority within the Fourth Amendment to detain Dinwiddie. See id. Since Dinwiddie was not illegally detained in the apartment, his subsequent statements were not the fruit of the poisonous tree. See Wong-Sun, 371 U.S. at 488; see also Hessman, 369 F.3d at 1023-24.

The motion to suppress statements should be denied.

B. Motion to Suppress Packing Slip

At the hearing, Dinwiddie moved to suppress the packing slip that officers removed from his back pocket.

The government bears the burden of proving that a defendant's consent to a search was voluntary by a preponderance of the evidence. United States v. Willie, 462 F.3d 892, 896 (8th Cir. 2006), cert. denied, 127 S. Ct. 1847 (2007). The question of voluntariness requires a review of all the facts. Id. There is no bright-line test for

determining whether a defendant's consent was a free and unconstrained choice, or instead, the result of duress or coercion. Id.

A number of factors influence whether a defendant's consent was voluntary. Id. The factors include the characteristics and behavior of the defendant, especially the defendant's age, intelligence, education, knowledge of his constitutional rights, whether he was impaired at the time, and whether he objected to the search. Id. A second factor includes the surrounding environment, and looks to whether the defendant was in a public or secluded place, and whether the defendant was in custody or under arrest at the time of consent. Id. A third factor includes the interaction between the police and the defendant, and looks to whether the officers detained the suspect before obtaining his consent, questioned him before obtaining his consent, and threatened, intimidated, or made false promises or misrepresentations to obtain consent. Id. No one element is dispositive; the defendant's consent must be judged by looking to the totality of the circumstances. Id.

Looking to the totality of the circumstances, Dinwiddie's consent to search was voluntary. When Dinwiddie drove up to the parking lot, officers approached him immediately and asked his permission to search his person. Dinwiddie was not handcuffed, arrested, or otherwise restrained when the officers requested his consent to search. He consented in a public place. The officers did not have their guns drawn when they requested consent, and did not use any threats, force, or coercion against Dinwiddie. They also did not make any promises or misrepresentations to Dinwiddie in an attempt to obtain his consent.

Dinwiddie was able to understand the officers' request. He did not appear to be under the influence of any controlled substances or alcohol. At the time of the request, he was 28 years old, had attended one year of college, and had been arrested on previous occasions. Based on these facts, Dinwiddie's consent to search his person was voluntary.

When officers search based on consent, the search must fall within the scope of the defendant's consent. See Florida v. Jimeno, 500 U.S. 248, 251 (1991). The scope of a defendant's consent is measured according to an objective reasonableness test, and asks what would the

"typical reasonable person have understood by the exchange between the officer and the suspect?" Id. In general, the scope of a search is defined by its stated purpose. Id.

In this case, the officers asked Dinwiddie if they could search his person. This request was not unclear or ambiguous, and Dinwiddie never objected to the search of his back pocket. Indeed, a reasonable person, after consenting to a search, would have understood that the officers would search his pockets. See United States v. Crasper, 472 F.3d 1141, 1149 (9th Cir. 2007) (officer's search of defendant's pocket was valid, after defendant voluntarily consented to search of his person).

The motion to suppress the packing slip should be denied.

C. Motion to Suppress Other Evidence

Dinwiddie moves to suppress as evidence any items the government seized from his residence (416 Manorstone Lane), his business, C & M Wheels (2901 Fort Campbell Boulevard), and his sister's apartment (376 South Lancaster, Apartment 266).[5] Dinwiddie also moves to suppress as evidence any information the government accessed from his cellular phone.

Dinwiddie argues the government seized the evidence pursuant to search warrants that were overbroad and lacked particularity. He also argues there was an insufficient nexus between the suspected criminal activity and the areas to be searched, there are no facts to support "Dee" being Dennis Dinwiddie, and the supporting affidavits contain illegally obtained evidence. In the alternative, Dinwiddie argues the search warrants were improper on their face and the good faith exception does not apply. Finally, Dinwiddie argues the government searched his

[5]In his motion, Dinwiddie does not move to suppress the tennis shoes seized from his sister's apartment. For the sake of thoroughness, the undersigned will include this evidence within the motion to suppress.

In his motion, Dinwiddie moves to suppress evidence seized from his 1995 Chevrolet Caprice. (Doc. 224.) In response, the government states it will not present any evidence at trial seized from the Caprice. (Doc. 252 at 9.) The motion to suppress evidence is therefore moot as it relates to the Chevrolet Caprice.

cellular phone without a warrant, and therefore, that search was per se unreasonable. (Docs. 224, 245.)

Particularity Requirement

Dinwiddie argues the government seized the evidence pursuant to search warrants that were overbroad and lacked particularity.

The Fourth Amendment to the Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. To secure these rights, the Fourth Amendment provides "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Id. The goal of the Fourth Amendment is to ensure that a search will be carefully tailored to its justifications, and will not become a wide-ranging exploratory search. Maryland v. Garrison, 480 U.S. 79, 84 (1987). The particularity requirement serves this goal by preventing general "rummaging in a person's belongings" and preventing "the seizure of one thing under a warrant describing another." Andreson v. Maryland, 427 U.S. 463, 480 (1976). Whether or not to seize an item is not within the discretion of the officer executing the warrant. Id.

A search warrant is adequately worded if its description of the evidence to be seized is sufficiently definite to enable the searching officers to identify the property authorized to be seized. United States v. Summage, 481 F.3d 1075, 1079 (8th Cir. 2007), cert. denied, --- S. Ct. ---- (Jan. 7, 2008). How definite or specific a warrant must be will depend on the circumstances of the case and on the type of items involved. Id. The particularity requirement is a standard of practicality rather than technicality. Id.

In this case, each of the warrants listed "a .45 caliber handgun, a .32 caliber handgun . . . blood, bloody clothing, DNA evidence and fiber evidence, any or all equipment, devices, records, computers and computer storage discs, to include the seizure of computers to retrieve such records . . . all financial records pertaining to the disposition of the proceeds of the violation of the criminal laws specified

above . . . [and] programmable instruments such as telephones, voice mail, answering machines, [and] electronic address books" among the items to be searched. (Exhibits D-5, D-6, D-7.) At Dinwiddie's residence, the officers seized a receipt from the Flying J Travel Plaza. This receipt was dated April 22, 2006 - the date of the murder - and therefore authorized by the seizure of "records." The officers also seized a computer tower, two pairs of boots, two t-shirts, and a pair of blue jeans. Seizure of these items was authorized, respectively, by the authority to seize "computers and computer storage discs," and "bloody clothing, DNA evidence and fiber evidence . . . ." See Summage, 481 F.3d at 1079.

At C & M Wheels, the officers seized two pieces of paperwork. The seizure of the paperwork was authorized by the seizure of "records," even if not immediately identifiable as a "record." See id. Under Summage, officers do not need to determine the precise nature of an item on-site. Id. In an effort to preserve an individual's privacy, officers may analyze off-site, the nature of relevant materials. Id. In this case, the paperwork could be seized on-site, and examined off-site to determine if it fell within the "records" authorized by the search warrant. See id.

At Barbara Dinwiddie's apartment, the officers seized a pair of tennis shoes. Seizure of the tennis shoes was authorized by the authority to search for "bloody clothing, DNA evidence and fiber evidence . . . ." See id.

The warrants authorizing searches of Dinwiddie's residence, Dinwiddie's business, and Barbara Dinwiddie's apartment were sufficiently definite to enable the searching officers to identify the property authorized to be seized.

Probable Cause Requirement

Dinwiddie argues there was an insufficient nexus between the suspected criminal activity and the areas to be searched.

For a warrant to issue properly under the Fourth Amendment, the warrant must be supported by probable cause. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). Probable cause exists, if under the totality

of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. In deciding whether there is probable cause to support a warrant, a judge may draw reasonable inferences from the totality of the circumstances. Summage, 481 F.3d at 1079.

In this case, each of the warrants was supported by probable cause. The first search warrant authorized a search of Dennis Dinwiddie's residence, 416 Manorstone Lane. In the supporting affidavit, the swearing officer detailed Dennis Dinwiddie's involvement with obtaining and distributing quantities of marijuana. In addition, the swearing officer stated that drug dealers "very often will hide contraband, proceeds of drugs sales and records of drug transactions in secure locations such as their own residences . . . ." (Exhibit D-5.) Based on the swearing officer's experience, there was a fair probability that evidence of a crime would be found at Dinwiddie's residence. See, e.g., United States v. Caswell, 436 F.3d 894, 899 (8th Cir. 2006) (judges can infer, "in the case of drug dealers, that evidence is likely to be found where the dealers live."); United States v. Johnson, 641 F.2d 652, 659 (9th Cir. 1980) ("Drug dealers frequently hide contraband at their residences.").

The second search warrant authorized a search of Dennis Dinwiddie's business, C & M Wheels, 2901 Fort Campbell Boulevard. In the supporting affidavit, the swearing officer noted how Clarksville police officers had performed a consent search of Dinwiddie's person and his vehicle shortly after the controlled delivery. In searching the vehicle, the officers found $10,000 in cash in the trunk of Dinwiddie's vehicle. Dinwiddie stated the money was related to his business, C & M Wheels. In addition, the swearing officer stated that drug dealers "very often will hide contraband, proceeds of drugs sales and records of drug transactions in secure locations such as . . . their businesses . . . ." (Gov. Ex. D-6.) In light of the swearing officer's experience and Dinwiddie's own statement, linking the $10,000 in cash to C & M Wheels, there was a fair probability that evidence of a crime would be found at Dinwiddie's business. See, e.g., United States v. Porter, 221 Fed. Appx. 836, 839 (11th Cir. 2007), cert. denied sub nom, Flowers v. United

States, 128 S. Ct. 521 (2007) ("The evidence showed that the liquor store was a 'front business' established by the conspiracy to facilitate its drug dealing and to launder the proceeds."); United States v. Bonadonna, 775 F.2d 949, 951-52 (8th Cir. 1985) (the defendants "formed a corporation . . . to launder money from their illicit drug dealings.").

The last search warrant authorized a search of Barbara Dinwiddie's apartment, 376 South Lancaster, Apartment 266. In the supporting affidavit, the swearing officer detailed how the Clarksville Police Department had performed a controlled delivery of marijuana to Barbara's apartment. In addition, the swearing officer stated that drug dealers "very often will hide contraband, proceeds of drugs sales and records of drug transactions in . . . residences of others who are participants in or aiders and abettors of the drug conspiracy . . . ." (Gov. Ex. D-7.) In light of the controlled delivery at Barbara Dinwiddie's apartment and Barbara's relation to Dennis Dinwiddie, there was a fair probability that evidence of a crime would be found at Barbara Dinwiddie's apartment. See United States v. Hernandez-Rodriguez, 352 F.3d 1325, 1332 (10th Cir. 2003) ("When the warrant affidavit refers to a controlled delivery of contraband to the place designated for search, the nexus requirement of probable cause is satisfied . . . .").

The warrants authorizing searches of Dinwiddie's residence, Dinwiddie's business, and Barbara Dinwiddie's apartment were supported by probable cause.

"Dee" as Dennis Dinwiddie

Dinwiddie argues there is no proof he is "Dee."

The supporting affidavit describes the controlled delivery of marijuana at Barbara Dinwiddie's apartment and the subsequent consent search of Dennis Dinwiddie. During that search, Dinwiddie explained that he was a co-owner of C & M Wheels. The supporting affidavit later describes the events of April 22, 2006, through the statements of Michael Hunt. Hunt referred to Dennis Dinwiddie as "D." The affidavit then states, "'D' was later identified as Dennis Dinwiddie, who is part

owner of a tire and wheel shop in Clarksville, Tennessee." (Gov. Exs. D-5, D-6, D-7.)

According to the facts, the Missouri State Highway Patrol interviewed Michael Hunt on April 26, 2006. At the time, the officers had not yet connected "Dee" with Dennis Dinwiddie. However, by the end of the interview with Hunt, Sgt. Stoelting remembered seeing a Clarksville phone number on Burgos's phone records linked to a Dennis Dinwiddie. After this discovery, the officers requested a photographic lineup with Dennis Dinwiddie. The next day, Hunt identified Dennis Dinwiddie as "the man I know as Dee." (Gov. Ex. D-2.) The same day, Billy Meador also identified Dennis Dinwiddie as the man "known to me as Dee." (Gov. Ex. D-10.) Hunt and Meador each made their identifications around 2:00 p.m. Later that evening, the officers prepared the applications for search warrants presented to Judge Hestle.

The supporting affidavit relies heavily on facts from the statements of Michael Hunt. And before compiling the search warrants, Hunt positively identified Dennis Dinwiddie as Dee. The affidavit also states that officers were able to capture several phone numbers from Burgos's cell phone records. Based on these facts, there was sufficient proof that Dee was Dennis Dinwiddie when the warrant affidavit was presented to Judge Hestle. The search warrants were not invalid simply for failing to list all the underlying facts supporting the stated conclusion that "'D' was later identified as Dennis Dinwiddie . . . ." See United States v. Liberti, 616 F.2d 34, 37 (2d Cir. 1980) ("Police officers applying for search warrants are not required to provide a [judge] with all the information in their possession.").

Illegally Obtained Evidence

Dinwiddie argues the supporting affidavits contain illegally obtained evidence. The illegally obtained evidence refers to statements officers obtained from Dinwiddie on January 27, 2006, while he was at his sister's apartment. As noted above, these statements were obtained legally.

Facially Invalid

Dinwiddie argues the search warrants are invalid on their face because the warrants indicate they were returned on February 28, 2006.

Agent Kelly Darland delivered the search warrants for Dinwiddie's residence, Dinwiddie's business, and Barbara Dinwiddie's apartment to Judge Hestle on April 27, 2006, at 9:10 p.m. (Gov. Exs. D-5, D-6, D-7.) However, the handwritten notation indicates the warrant for Dinwiddie's residence and Dinwiddie's business were returned on "February 28, 2006." The handwritten notation for Barbara Dinwiddie's apartment shows the warrant was returned on April 28, 2006.

The "February 28, 2006," return date is obviously incorrect. However, the incorrect date is no more than a clerical error, and does not affect the validity of the search warrants. See United States v. Henderson, 471 F.3d 935, 937 (8th Cir. 2006) (Judge's "clerical error" does not affect the validity of the warrant).

Good Faith Exception

Dinwiddie argues the good faith exception does not apply. Since the warrants are valid and supported by probable cause, the good faith exception need not be addressed. See Summage, 481 F.3d at 1080.

Cellular Phone

Dinwiddie argues the information accessed from his cellular phone should be suppressed. In particular, Dinwiddie argues the search of his cellular phone was without a warrant, and therefore, per se unreasonable. The facts of the case contradict this argument. Each of the search warrants authorized a search "upon Dennis Dinwiddie" for "programmable instruments such as telephones . . . [and] electronic address books . . . ." (Gov. Exs. D-5, D-6, D-7.) The warrant for Dinwiddie's business states that the evidence of a crime will be found "upon Dennis Dinwiddie and/or C&M at 2901 Fort Campbell Boulevard . . . ." (Gov. Ex. D-6) (emphasis added). The warrant does not require that the search of Dinwiddie occur at the location named in the warrant. The search warrants were not returned until after Dinwiddie's arrest.

During Dinwiddie's arrest, officers seized the cellular phone and later accessed a list of the received calls, dialed calls, and the phone's address book. The seizure of the cellular phone and subsequent search of the phone's call logs and address book were authorized by the search of "programmable instruments such as telephones." The search of the phone's address book was also authorized by the authority to search for "electronic address books." (Gov. Exs. D-5, D-6, D-7.)

That said, the officers failed to list the cellular phone within the list of items seized. This omission does not render either the cell phone or the information accessed suppressible. See United States v. Nichols, 344 F.3d 793, 799 (8th Cir. 2003) (where executing officers fail to provide a complete inventory of items seized, suppression is required only if a defendant can demonstrate prejudice). The officers arrested Dinwiddie pursuant to an arrest warrant (Gov. Ex. D-8), and searched the phone pursuant to a search warrant (Gov. Exs. D-5, D-6, D-7). In addition, Dinwiddie and his counsel are aware the cellular phone was seized and searched, and have moved to suppress this evidence. Dinwiddie has not been prejudiced. See United States v. Dudek, 530 F.2d 684, 687 (6th Cir. 1976). Unlike the case of an unlawful search and seizure, the failure of an officer to file an inventory does not violate any fundamental rights of the defendant. Id. Simply put, "[t]here is no prejudice to the defendant that is inherent in the failure of the officer to file an inventory." Id.

Seizure of the cell phone and the subsequent search of the call logs and address book were authorized by the language of the search warrants. The motion to suppress evidence obtained from the search warrants should be denied.

D. Motion to Suppress Identifications

Dinwiddie moves to suppress the photographic lineup identifications by Michael Hunt, Billy Meador, and Raoul Cruz. Dinwiddie argues that the identifications were the result of undue coercion and were based on procedures that were unduly suggestive and inherently unreliable. (Docs. 231, 259.)

Undue Coercion

Dinwiddie argues the witnesses' identifications were the result of undue coercion. Specifically, he argues any identifications the witnesses made while in police custody were unreliable.

Billy Meador and Michael Hunt each came to the police departments voluntarily on the days they made the photographic identifications. Only Raoul Cruz was under arrest when he identified Dennis Dinwiddie from the photographic lineup. The circumstances of Cruz's identification do not indicate the police engaged in undue coercion, making the identification unreliable. When Sgt. Heath showed Cruz the lineup, Cruz was not handcuffed, threatened, coerced, or given any promises. Sgt. Heath explained that a man involved in the April 22, 2006, incident might, or might not, be in the lineup. Under these facts, Cruz was not coerced and his identification was not unreliable simply by being in custody. See United States v. Woolery, 735 F.2d 818, 821 (5th Cir. 1984) (identification was suggestive, but still reliable, where witness had been threatened with jail and felt he could "go free" if he could identify the right person).

Unduly Suggestive and Unreliable

Dinwiddie argues the identifications were based on police procedures that were unduly suggestive and inherently unreliable.

Under the Due Process Clause, identification evidence must be suppressed if it results from procedures that are unnecessarily suggestive and which may lead to an irreparably mistaken identification. Stovall v. Denno, 388 U.S. 293, 301-02 (1967). To test the reliability of identification procedures, courts engage in a two-step process. See United States v. Rose, 362 F.3d 1059, 1065 (8th Cir. 2004). First, the court considers whether the identification procedures were impermissibly suggestive. Id. Then, if the procedures were impermissibly suggestive, the court looks to the totality of the circumstances to determine whether the suggestive procedures created a substantial likelihood of irreparable misidentification. Id. In

evaluating the likelihood of misidentification, five factors should be considered: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty the witness demonstrates during the identification; and (5) the length of time between the crime and the identification. Manson v. Brathwaite, 432 U.S. 98, 114-16 (1977).

In this case, the identification procedures were not impermissibly suggestive. Billy Meador, Michael Hunt, and Raoul Cruz were all shown the same photographic lineup. The lineup was compiled by a civilian employee in Jefferson City, Missouri, who was not actively involved in the investigation. The lineup consisted of two rows of three photographs, each set against a blue background with a head-to-shoulders picture. Each of the six photographs featured an African-American male, with short hair, a moustache, and a goatee. All of the men appeared to be within a similar age range. Including the picture of Dinwiddie, three of the men were wearing glasses and five of the men had dark complexions. None of the men had facial features that distinguished him from the others. Given the similarity in the photographs, the lineup card itself was not unduly suggestive. See Rose, 362 F.3d at 1066 (photographic lineup was not suggestive, where the six photographs featured men with similar physical features); see also United States v. Galati, 230 F.3d 254, 260 (7th Cir. 2000) ("A lineup of clones is not required.").

The police procedures were also not suggestive. In each of the three identifications, the police showed the witness the same photographic lineup. And in each case, the officer explained that the suspect from April 22, 2006, might, or might not, be in the lineup. The officers never made any threats or promises in connection with the photographic identifications. Given these facts, the police procedures were not suggestive.

Also, each of the three identifications was independently reliable. Billy Meador met Dinwiddie in February or March 2006. Billy first met Dinwiddie at his wheel shop. Later, Billy drove with Dinwiddie from Memphis to Clarksville -- some 200 miles. This drive afforded Billy

ample opportunity to view Dinwiddie. Once given the lineup card, Billy Meador immediately identified the picture of Dinwiddie. The identification occurred no more than three months after Billy Meador met Dinwiddie. See United States v. Martin, 391 F.3d 949, 953 (8th Cir. 2004) (four-month delay between the crime and viewing of the lineup did not create a likelihood of misidentification).

Michael Hunt first met Dinwiddie the day of the murder. Hunt ran into Dinwiddie when he first drove up to the Meador home. Later, after the murder, Dinwiddie approached Hunt and the two spoke face-to-face for three to four minutes. This encounter occurred during the day and Hunt described Dinwiddie as a tall, dark-skinned, skinny, African-American male, with glasses. A few days later, Hunt immediately identified the picture of Dinwiddie within the lineup.

Raoul Cruz also first met Dinwiddie the day of the murder. Cruz met Dinwiddie when he and Burgos entered the home. Later, Dinwiddie approached Cruz at the dump site, where Dinwiddie took down his information and told him to keep his mouth shut. Cruz described Dinwiddie as a tall, thin, African-American male, who wore glasses. About three weeks later, Cruz immediately identified the picture of Dinwiddie within the lineup.

Looking to the Manson factors, all three witnesses had a good opportunity to view Dinwiddie. Dinwiddie spoke to each of the witnesses, and Dinwiddie confronted two of the witnesses shortly after the murder. Cruz and Hunt each provided an accurate description of Dinwiddie. All three witnesses immediately identified Dinwiddie within the lineup. Hunt identified Dinwiddie within days of the murder; Cruz, within three weeks of the murder; and Billy Meador, within three months of the murder. Each of the identifications was independently reliable. See Manson, 432 U.S. at 114-16.

The motion to suppress identifications should be denied.

RECOMMENDATION

For the reasons set forth above,

IT IS HEREBY RECOMMENDED that the motions of defendant Dennis Dinwiddie to suppress statements (Doc. 223), to suppress evidence (Docs. 224 and 245), and to suppress identification (Docs. 231 and 259) be denied.

The parties are advised they have thirty days to file written objections to this Report and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

/S/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on January 29, 2008.